

BRB No. 94-4037 BLA

JIMMY L. RIFE)	
(Widow of RALPH C. RIFE))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
R. L. & H. COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Jimmy L. Rife, Grundy, Virginia, *pro se*.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order

¹ Claimant is Jimmy L. Rife, widow of Ralph C. Rife, the miner, who died on December 3, 1989. Director's Exhibit 5. Claimant filed her application for benefits on October 23, 1992. Director's Exhibit 1. Tim White, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking*

(94-BLA-0318) of Administrative Law Judge Frederick D. Neusner denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with "at least"

Co., 19 BLR 1-88 (1995)(Order).

twenty years of coal mine employment and determined that employer was the responsible operator. Decision and Order at 2. The administrative law judge found that, regardless of whether the existence of pneumoconiosis was established, the evidence failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employer urges affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.²

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² We affirm as unchallenged on appeal the administrative law judge's findings regarding the length of coal mine employment and responsible operator status. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To establish entitlement to benefits under 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner's death was due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.205.³ Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Pursuant to Section 718.205(c)(1), the administrative law judge found that "neither the death certificate by the attending physician, the prosector's report, nor the hospital records of [the miner's] last illness suggest that . . . pneumoconiosis" caused the miner's death. Decision and Order at 4. The death certificate, prepared on December 8, 1989 by Dr. Thakkar, the miner's attending physician, stated that ventricular fibrillation due to arteriosclerotic heart disease caused the miner's death. Director's Exhibit 5.

The discharge summary of the miner's final hospital stay, prepared on the same day by Dr. Thakkar, also stated that ventricular fibrillation was the cause of death, listing chronic obstructive pulmonary disease (COPD) as a secondary diagnosis. Director's Exhibit 38. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.205(c)(1). We also affirm the administrative law judge's conclusion that the record contains no evidence of complicated pneumoconiosis pursuant to Section 718.304. See 20 C.F.R. §718.205(c)(3).

Pursuant to Section 718.205(c)(2), the administrative law judge noted that "the strongest evidence favoring the claimant's position is the opinion of Dr. Thakkar as the miner's attending physician" and inferred that Dr. Thakkar's February 1990

³ 20 C.F.R. §718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis:

- (1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or
- (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
- (3) Where the presumption set forth at §718.304 is applicable.

20 C.F.R. §718.205(c)(1)-(3).

opinion meant that "COPD materially impeded [his] efforts to prolong the patient's life during the final episode of heart failure."⁴ Decision and Order at 4, 6. The administrative law judge found Dr. Thakkar's February 1990 opinion unpersuasive in light of the unexplained conflict the administrative law judge perceived between it and the hospital discharge summary that "Dr. Thakkar prepared as attending physician on December 8, 1989, some sixty days earlier" but which did not discuss "the fatal effect of COPD on the miner." Decision and Order at 5-6.

The administrative law judge, however, failed to consider Dr. Thakkar's notation on the death certificate, prepared on the same day as the hospital discharge summary, that "coal workers' pneumoconiosis" was a significant condition leading to death. Director's Exhibit 5. The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has held that if pneumoconiosis hastens death in any way, it is a substantially contributing cause of death pursuant to Section 718.205(c)(2). *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In weighing the treating physician's opinion that COPD secondary to pneumoconiosis shortened the miner's life, the administrative law judge should have considered the notation on the death certificate along with the rest of Dr. Thakkar's statements to determine whether pneumoconiosis hastened the miner's death. See *Shuff, supra*; see also *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Therefore, we vacate the administrative law judge's finding pursuant to Section 718.205(c)(2) and instruct him on remand to make a threshold finding of whether the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.201, 718.202, and to consider all the relevant evidence under the *Shuff* standard, if necessary. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); see also *Shuff, supra*; *Grizzle, supra*; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, No. 94-2369 (4th Cir. Sept. 25, 1995).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

⁴ After discussing claimant's hospitalization for his cardiac problems, Dr. Thakkar wrote that "COPD secondary to coal worker's pneumoconiosis . . . was the sole cause of his death but when he developed a life threatening arrhythmia it was very hard to resuscitate him because of the COPD. Cardiac compression was somewhat difficult due to the COPD." Director's Exhibit 15.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____NANCY S.
DOLDER
Administrative Appeals Judge

_____REGINA C.
McGRANERY
Administrative Appeals Judge